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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 508

VIM SECURITIES CORPORATION,
Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF.

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Vim Securities Corporation prays that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit (R. 72) entered in the above cause on August 6, 1942, affirming a decision of the United States Board of Tax Appeals (R. 23-43).

OPINIONS BELOW.

The opinion of the United States Board of Tax Appeals (R. 23-43) is reported in 43 B. T. A. 759. The opinion of the Circuit Court of Appeals (R. 67-72) is not yet reported but may be found at Paragraph 9602, Vol. 4, 1942 Edition, Commerce Clearing House Tax Service.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on August 6, 1942 (R. 72). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. § 347).

QUESTIONS PRESENTED.

The case presents the following questions:

(1) Whether gain realized by the taxpayer as a result of receiving an award for the condemnation of its property was subject to the provisions of Section 112(f) of the Revenue Act of 1936, excepting gain from recognition where an award is expended in the acquisition of other property similar or related in service or use to the property condemned, or in the acquisition of control of a corporation owning such other property.

(2) Whether the taxpayer was engaged in business during the year 1936 within the meaning of the tax on excess profits.

The Court below held that the petitioner was not entitled to the benefits of the relief provisions of Section 112(f) of the Revenue Act of 1936 and that the corporation was engaged in business during the year 1936.

STATUTES INVOLVED.

Revenue Act of 1936: 49 Stat. 1681 (26 U. S. C. 112).

Sec. 112. Recognition of Gain or Loss.

> "(f) Involuntary conversions. If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commis-

sioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended."

Section 105(a) of the Revenue Act of 1935, as amended by Section 401 of the Revenue Act of 1936 provides as follows:

> "Section 105(a). For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock."

Section 106 of the Revenue Act of 1935 as amended by Section 402 of the Revenue Act of 1936 imposes an excess profits tax on every corporation which is subject to capital stock tax under Section 105 of the Revenue Act of 1935 as amended by Section 401 of the Revenue Act of 1936.

STATEMENT OF FACTS.

The Court of Appeals found the following facts (R. 68-69):

> Prior to June 28, 1935, Vim Securities owned a warehouse at 16 Concord Street, Brooklyn. The City of New York brought a condemnation proceedings to acquire title to the property. Title passed to the City on June 28, 1935, and under final decree of the New York Supreme Court, dated July 14, 1936, the award was fixed at $85,000 and interest and became payable on that date. The stock of Vim Securities was owned by four brothers named Kassover in equal proportions.
>
> Prior to June 28, 1935, Vim Electric, a corporation whose stock, like that of Vim Securities, was shared equally by the four Kassover brothers, occupied 16 Concord Street as tenant of Vim Securities, and after the condemnation continued to occupy them until the

latter part of December, 1935, under a temporary arrangement with the city. There- [fol. 69] after it moved to 325-27 Gold Street, Brooklyn, which it has since occupied, paying rent therefor to Gold Street Corporation, the formation of which we shall speak of later.

After the condemnation, and on August 19, 1935, one of the Kassovers made a contract with the Dime Savings Bank of Brooklyn to purchase 325-27 Gold Street for $110,000, of which $10,000 was to be paid on the execution of the contract, and $100,000 on the delivery of the deed in October. His purpose was to obtain a new warehouse in place of the one condemned. On October 4, 1935, Kassover assigned this contract to Gold Street Corporation, which had been organized by the Kassover brothers on October 1, 1935, in order to take title to the Gold Street premises. The stock of the corporation, like that of the other two companies, seems to have been owned by the Kassover brothers in equal shares. Its income tax return listed them as each owning 12½ shares and as its sole stockholders.

The initial payment of $10,000 required under the contract to purchase 325-27 Gold Street was made by checks of Vim Securities for $2,000 and of Vim Electric for $8,000. The payment of the balance of $100,000 necessary to complete the purchase was made on October 5, 1935, by the personal check of one of the Kassovers for $100,000, which was derived from deposits in his bank account of three checks of Vim Electric (drawn for the purpose) of which, as we have said, the four Kassovers were the sole stockholders. On November 27, 1935, Vim Securities, which had originally advanced $2,000 toward the purchase, delivered its check for $8,000 to Vim Electric in order to refund the latter's past contribution of $8,000. On January 29, 1936, Vim Securities made a further payment to Vim Electric of $5,000. On October 9, 1936, the City of New York paid the award of $85,000 and interest. This was done by paying [fol. 70] off a mortgage of $12,000 on 16 Concord Street and by paying the balance of $79,604.08 to Vim Securities whose property had been condemned. Vim Securities thereafter made further reimbursement to Vim Electric for the advances, made by the latter to purchase the Gold Street

property, by drawing its checks to Vim Electric between January and June, 1937, inclusive, for various sums aggregating $85,000, and by making a final payment of $10,000 on July 12, 1937.

The books of Vim Securities charged Vim Electric both with the $2,000 payment that Vim Securities had made to the Dime Savings Bank toward the $10,000 deposit for the purchase of 325-27 Gold Street and with the $8,000 originally paid by Vim Electric and later refunded to it by Securities.

The books of Vim Electric carried its payments to purchase Gold Street as an account receivable from Gold Street Corporation, and the latter carried them as an account payable to Vim Electric. It may be inferred that when Vim Securities reimbursed Vim Electric for the payments to purchase Gold Street, it thereby acquired the account receivable due Vim Electric from the Gold Street Corporation and became the creditor of the latter in the amount of $110,000. Gold Street Corporation carried debit and credit items of $5,500 on its books, designated as "interest Vim Electric Co., Inc.," and apparently representing interest accrued on Vim Electric's advances up to the time Vim Electric Company was reimbursed by Vim Securities. The books of Gold Street Corporation also carried the items "Real Estate, Taxes, Insurance, Interest on Mtges., Taxes, Depreciation," all representing expenses of the Gold Street Corporation.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

(1) In holding that the petitioner was not entitled to the benefit of the relief provisions of Section 112(f) of the Revenue Act of 1936 and that the gain resulting from the award under the condemnation proceedings was taxable in full to the petitioner corporation.

(2) By holding that the relief provisions of Section 112(f) of the Revenue Act of 1936 were inapplicable to the petitioner because the property purchased to replace the property condemned was bought in the name of Gold Street Corporation, whose stock was owned by the stockholders of the petitioner corporation in equal proportions.

(3) In holding that the decision of this Court in *Higgins* v. *Smith*, 308 U. S. 473 (involving gain on the sale of stock to a wholly owned corporation) should also be applied in cases such as the one at bar involving statutory relief provisions.

(4) In interpreting the relief provisions of Section 112(f) of the Revenue Act of 1936 strictly rather than liberally and resolving all doubts against the taxpayer.

(5) In holding that during the year 1936 the petitioner corporation was engaged in business and subject to excess profits tax even though during the year 1935 it had been deprived of its real property by condemnation proceedings and in 1936 merely received the condemnation award which was later paid to a creditor who advanced the money for the purchase of the property used in replacement.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals herein on both of the issues involved does not accord in principle with decisions of this Court and is in conflict with decisions of other Circuit Courts of Appeal.

2. The Circuit Court of Appeals had decided an important question of Federal tax law which has not been but should be settled by this Court.

CONCLUSION.

It is therefore respectfully submitted that this petition should be granted.

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